ESTHER VARETA
versus
TAURAI TALENT CHAZA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 12 & 30 October & 28 November 2023

Civil Appeal

M Magaya, for the appellant
F Ndou, for the respondent

MUNANGATI-MANONGWA J: This is an appeal against the whole judgment of the Magistrate Court sitting at Chitungwiza on 7 June 2023wherein the court awarded the custody of the parties minor child, a son, to the appellant's estranged husband. The child in issue is called X born on 30 October 2013. He is currently in boarding school in Macheke and is in 5th grade.

The background facts of this matter are as follows: The respondent who is the child's father approached the court seeking custody of the minor child. In his affidavit the respondent stated that the parties separated in 2017 and the respondent took the couple's two children with her and dumped them in rural Gokwe at her mother's place and left for South Africa. He stated that in or around 2021 worried about the plight of the children he collected the children from Gokwe and started staying with the children in Chitungwiza. Seemingly by agreement, the parties' daughter went to stay with a relative in Budiriro. X the child in dispute being the youngest was put in boarding school. The respondent would stay with him during holidays at his parents' home in Chitungwiza. The respondent claimed that this was the routine of the child for the past two years prior to the hearing in the court *a quo* in May 2023. The respondent also claimed in the court *a quo* that the appellant took custody of the child during the April 2023 holidays after picking the child from boarding school. He alleged that appellant failed to return the child to school. Upon confronting her, the respondent was allegedly told that the child was not going back to boarding school as the appellant had already secured a place for her at an alternative school. It is clearly this stance that led the respondent to apply for custody.

The respondent stated in his founding affidavit that "……all I want is custody so that the child can go back to school where he had settled very well and was accustomed to. I am further advised that it is not in the best interests of the child to be shoved from one place to the other and from one school to another for no apparent reason."

The appellant submitted in her opposing affidavit in the court a *quo* that she has been taking care of both the couple's children who were in boarding school. She stated that upon separation in 2017 the respondent went to the United States of America and came back in 2021 after the Covid era and that during those years of the respondent's absence, she was taking care of the two children without the respondent's assistance. She admitted going to South Africa but wold return to in Zimbabwe every school holiday to be with the children. She would stay with them as the respondent was sometimes in America and sometimes in Afghanistan for work. She presented copies of her passport bearing stamps of when she would come back to Zimbabwe during school holidays over the years. She stated that she came back to Zimbabwe to stay permanently in September 2022 as she now wanted to be with the children and monitor them closely. She thus argued that she had custody of the children in that period. It was the appellant's evidence that the respondent came and violently grabbed the child in May 2023 and indicated that he would approach the court for custody. That is when respondent applied for custody on 15 May 2023. Meanwhile the appellant had found a place for the child at a private school, paid fees and uniforms. The child had started attending a new school by the time the custody matter was instituted.

The respondent denied having been continuously abroad. He averred that he would only go abroad on work assignments and had custody of the child. He denied being violent upon taking the child and averred that he politely requested the child to go to school. The court *a quo* granted the application for custody and the appellant has appealed against that decision.

The appellant fielded three grounds of appeal which are:

1. That the court misdirected itself in making a finding that the applicant works in South Africa when there was empirical evidence to show that she is now fully based in Zimbabwe and has never returned to South Africa since September 2022.
2. That the court misdirected itself in making a finding that the respondent was the one looking after the child and paying for his school fees when there was

empirical evidence to show that the appellant was the one paying school fees and taking care of the child since 2017.

3. That the court erred on a point of law and fact in granting the application for custody by failing to consider holistically that the best interests of the child were to be best cultivated with the applicant.

The appellant seeks that the order of court be set aside and be substituted with the order for dismissal of the application.

The first two grounds essentially attack the findings of fact.

Ground 1. That the applicant is based in South Africa

The finding by the court a quo that the respondent works in South Africa and is only available during school holidays meaning the children will be in the custody of a third party in her absence is not supported by the facts led. It is not denied by the parties that both the children were in boarding school. The appellant had also led evidence that she has been in Zimbabwe since September 2022 and had no intention to go back to South Africa and no contrary evidence had been led on the aspect. She had been based in South Africa but had returned to permanently stay in Zimbabwe. Thus the finding is not supported by facts and could not have been a basis for removing custody from her.

Ground 2. That the respondent was the one financially looking after the child

The court *a quo* made a finding that the appellant had provided receipts for second term confirming she changed the child's school as alleged by respondent which showed that the respondent was the one responsible for the child all the time. This certainly was a misreading of facts and an incorrect conclusion. The respondent herein had not placed before the court any evidence of financial support to buttress that finding.

All factual findings have to be grounded on facts presented to court and accepted by the court as credible evidence. A court should not draw conclusions on an issue unless the conclusion is factually supported by the requisite evidence. Suffice that the success of the two grounds do not *per se* become the ultimate determining factors in the appeal. This is because the best interests of the child are what the courts are obliged to consider. The question becomes, given all the evidence and the surrounding circumstances did the court *a quo* consider what is in the best interests of the child.

Ground 3. Failure to holistically consider the best interest of the child

Every court that sits to determine any issue pertaining to rights of a child is guided by the worldwide accepted principle that the best interests of the child should be the determining factor. This principle is stated in s 81(2) of the Constitution of Zimbabwe Act, 2013. Section 81(2) provides as follows:

"**(2) A child's best interests are paramount in every matter concerning the child."**

Regional and International Conventions restate the same principle. Article 4 of the African Charter on the Rights of and Welfare of a Child which reads exactly the same as Article 3 of the United Nations Convention on the Rights of a Child provides as follows:

> "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'"

Thus in assessing evidence at hand and what transpired in the court *a quo* this court had to ensure that the primary consideration of the best interests of the child had been taken on board. The evidence at hand shows that at one time both parents went outside the country particularly upon separation and the maternal grandmother took care of the children in Gokwe where after the children were then removed and sent to boarding schools. The blame game in this instance does not work as at one time the children had no parent around and a third party had to take care of them. The appellant provided evidence that she would come every holiday from South Africa to be with the children. Meanwhile the respondent alleged in his affidavit that he had the children during holidays.

As the upper guardian of children and having noted that the court *a quo* had not been properly guided by the best interests of the child, it was considered advisable to interview the child concerned. The court we requested that the child be brought before us to be interviewed. Suffice that this is in line with a child's right as espoused in s 81(1) of the Constitution which provides for children's rights particularly that a child has a right to be heard. This was considered necessary so that the court would holistically consider the circumstances pertaining to the welfare and education of the child as part of the considerations to be taken into account in determining what is in the child's best interests. This was further necessitated by the fact that there had been various allegations and counter allegations in the court *a quo* as to what particularly was happening with the child. Evidence had been led by the appellant that the boarding school was not suitable for the child as he had health issues and was also experiencing some bullying due to bed wetting tendencies. An impression had been created that the child was in a dire situation and it was not in his best interests to be in boarding school.

The child was brought to court from his current school Macheke Primary School, in the company of the school matron. The child informed the court that he preferred to be with the mother although he loved his father. He indicated that at one time his mother was in South Africa but would come every school holiday to be with him and his sister. He further indicated that at that time his father was away. He confirmed that together with his sister they had briefly stayed in Gokwe with his maternal grandmother and he attended to school there. He indicated that he enjoyed his stay in Gokwe although he had to walk to school. The child was relaxed and did not show any signs of ill health although he confirmed that he had a health condition which prevented him from eating hot foods.

The court had occasion to interview the Matron who indicated that prior to the custody matter the child was attending boarding school at her school in Macheke and the child was happy and also popular with other children. He delayed in returning to school during the second term. When he finally came he was not his usual self as he had withdrawn and was no longer as vocal a he used to be. She confirmed that the appellant used to visit the child on visitation days but last term she did not come. In her view the court case had somehow affected the child. Apart from that the child had no other issues.

It is apparent to the court that what drove the respondent to apply for custody was the intended removal of the child from boarding school by the appellant. In fact the respondent asserted several times in his affidavit that he wanted custody "so that the child can go back to school where he had settled well,"[1] and that it was not in the best interests of the child to be moved from one school to the other[2]and that he wanted custody "so as to enable the child to attend a descent school."[3]

Certainly the respondent's concern about the children's education does count as it is in the best interests of the child that he receives the best possible education. However that again is not the only consideration for one to be granted custody. The social welfare of the child, health consideration, mental, psychological, moral and religious developments of a child are some of the consideration that a court has to make. This, the court *a quo* failed to take into consideration as it relied on an unfounded fact that the respondent has been the one looking after the child on his own. Contrary to that finding, the record points to the presence of the appellant in the taking care of the child. She had the medical records which showed visits for medical checkups, she would ensure that on each and every holiday she travelled

[1] "para 6 of respondent's founding affidavit in the court a quo
[2] See para 7 of respondent's founding affidavit
[3] "see para 9 of the respondent's founding affidavit in the court a quo

back from South Africa to be with the children. The child confirmed that this was the prevailing situation. The matron buttressed the fact that the mother had been visiting the child at school. The appellant had not ignored the child's educational needs as she had placed him in school. That the child has withdrawn and showed change of character upon his return to school shows how this whole matter has affected him.

As stated in *Mukunda* v *Chigumadzi* HC 7048/15 and in *Machika* v *Makoni* HH 271/23, the feelings and protestations of the parents of a child or their unhealed egos cannot detain a court from effecting and executing the mandate of ensuring that the best interests of the child takes paramount consideration in determining the issue at hand. The Constitution unequivocally gives the High Court the authority to decide what is in the best interests of a child irrespective of the child's parents' views. In the result, this court finds that the decision by the court *a quo* to grant custody to the respondent on the basis that the respondent resides in the country and can best attend to the needs of the child in contrast to the appellant who resides in South Africa and cannot be available for the child was a misdirection as it was not based on fact. Further, the court *a quo* failed to take into account the best interests of the child given his age and the fact that he still required motherly love and that the mother who has always had an interest in the child's affairs was now wholly resident in Zimbabwe. Suffice that the thread that ran across the respondent's application for custody was to have the child return to boarding school rather than anything else. If the issue pertaining to the child not being returned to boarding school did not find favour with the respondent, relief could have been achieved by a different application rather than an application for custody.

In that regard the appeal succeeds on all grounds and it is ordered as follows:

1. The application for custody of the minor child X be and is hereby dismissed.
2. Each party to bear its own costs.

Mavhunga & Associates, applicant's legal practitioners
Maseko Law Chambers, respondent's legal practitioners

MUNANGATI-MANONGWA J :…….

CHITAPI J:…… .Agrees